No. 43284-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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NATALIYA MAKARENKO,

Respondent/Plaintiff,

vs.

CIS DEVELOPMENT FOUNDATION, INC.,
a New Jersey non-profit corporation,

Appellant/Defendant.

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# REPLY BRIEF OF APPELLANT CIS DEVELOPMENT FOUNDATION, INC.

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Appellant CIS Development Foundation, Inc. ("CISDF") respectfully submits its Reply Brief on appeal.

## A. INTRODUCTION

Respondent Makarenko's Answering Brief painstakingly dances around the controlling jurisdictional issues central to the instant appeal. Her brief never breathes the word "jurisdictional". It is silent on the jurisdictional nature of the challenges to Makarenko's default judgment under the long arm statute, RCW 4.28.185 and Civil Rule 55(a), which directly stem from her defective statutory affidavit and failed notice.

Despite the critical jurisdictional issues presented, Makarenko cavalierly asks this Court to view leniently and forgivingly not only (i) the form of her counsel's RCW 4.28.185(4) statutory affidavit (CP 12), but also (ii) the form of her counsel's highly unorthodox "letter" notice (CD 184) to CISDF prior to entry of the default judgment. At the same time, Makarenko demands a harsh and unforgiving application of the Civil Rules against CISDF to: (i) nullify an otherwise timely served answer and counterclaim due to an allegedly deficient form under Civil Rule 8; (ii) to re-characterize what is manifestly a meticulous, line by line, answer and response by CISDF to her complaint as a "letter" of no legal import, let alone an appearance triggering the notice requirements of Civil Rule 55(a); and (iii) to deny CISDF any opportunity to correct - prior to or after entry of the default judgment - the

pro se nature of its answer and appearance.

Notwithstanding detailed declarations by the principals of CISDF, asserting that they did everything they promised Makarenko, and providing bills of lading (CP 59-90) and receipts (CP 60-63) demonstrating their timely and complete delivery of over $1.3 million of donated clothing to the St. Nicholas charity in the Ukraine, Makarenko claims CISDF still did not do enough under Civil Rule 60(b) to establish a prima facie defense to her claims. And, she demands that for purposes of ruling on CISDF's 60(b) motion that the Court accept her declarations – replete with inadmissible hearsay statements attributed to her brother and a representative of the Ukrainian charity – and essentially reject any relief for CISDF based on highly suspect allegations of fraud; all without a trial on the merits.

Makarenko further claims CISDF's allegedly unclean hands and inequitable conduct (apparently for appearing pro se in the first place, and in not filing its answer and counterclaim with the trial court) preclude vacation of her default judgment. Nonetheless, Makarenko asks this Court to look the other way when it comes to: (i) her counsel's continued pursuit of a motion for default in the face of CISDF's timely served answer and counter-claim, (ii) her counsel's disregard of a November 3, 2011 call and notice from a New York attorney advising of CISDF's intent to find Washington State counsel to defend itself; (iii) her counsel's failure to notify the trial

court of his receipt of a timely served answer and counterclaim from CISDF; and, (iv) her counsel's misleading reference to CISDF's answer as a letter, evidencing absolutely no intent to appear and defend against her claims.

Finally, Makarenko makes no rebuttal whatsoever to CISDF's showing of substantial prejudice to its reputation and goodwill as a non-profit entity, if the default judgment stands and a trial on the merits is denied. Instead, Makarenko claims substantial prejudice based not upon the procedural issues relating to entry and/or enforcement of the default judgment, but upon the truth of the allegations in her complaint (as if the merits had already been adjudicated against CISDF).

In sum, the arguments presented by Makarenko fail to address credibly or logically the trial court's errors and abuse of discretion in denying CISDF's motion to vacate, in disregarding longstanding judicial policies favoring a trial on the merits and disfavoring default judgments, and in disregarding the compelling equities in favor of vacation of the default judgment.

B. THE JURISDICTIONAL DEFECTS IN MAKARENKO'S RCW 4.28.185(4) STATUTORY AFFIDAVIT.

Makarenko does not challenge the well-established case law which holds a default judgment void as a matter of law, if the required statutory affidavit under our long arm statute, RCW 4.28.185(4), is defective. Morris v. Palouse River and Coulee City Railroad, Inc., 149 Wn.App.

361, 203 P.3d 1069, 1071 (Div. Two 2009), review denied 166 Wn.2d 1033, 217 P.3d 782 (2009) Still, her Answering Brief (at pp. 28-31) mis-apprehends CISDF's argument and the case authorities on this issue in contending that: (i) there was substantial compliance by her with RCW 4.28.185(4); (ii) the cases cited by CISDF "concerned situations where the separate affidavit was filed after the judgment was obtained or never filed at all"; and (iii) no violation of RCW 4.28.185(4) occurred because CISDF allegedly failed to show any resulting "injury" or "prejudice".

Contrary to Makarenko's assertions, CISDF's authorities address specific situations where either (i) process service affidavits filed prior to entry of a default judgment were scrutinized for compliance with RCW 4.28.185(4), i.e. Sharebuilder Securities v. Hoang, 137 Wn. 330, 153 P.2d 222, 224 (Div. One 2007), and Morris v. Palouse River and Coulee City Railroad, Inc., supra, or (ii) a detailed statutory affidavit was prepared and filed later in the trial court proceeding, but before entry of a default judgment, i.e. Barr v. Interbay Citizens Bank of Tampa, Florida, 96 Wn.2d 692, 696, 649 P.2d 827 (1982). In each case, the appellate court: (i) acknowledged the jurisdictional nature of the statutory affidavits, and (ii) required, for compliance with RCW 4.28.185(4), that an affidavit do more than mouth the language of the statute.

In Makarenko's situation, her statutory affidavit barely tracks the language of RCW 4.28.185. Makarenko's counsel's meager statutory affidavit (CP 12, 171-2) reads: "We cannot personally serve this document within Washington State." No other detail on the alleged failed service is provided. And, Makarenko's affidavit has no attachments, and fails otherwise to identify what "document" could not be served. (Supra)

Notwithstanding these discrepancies, Makarenko self-servingly claims (Answering Brief, at pp. 29-30) "substantial compliance" with RCW 4.28.185(4). She contends that the fact her counsel's affidavit was based on "personal knowledge" more than compensates for an otherwise patently deficient statutory affidavit. No authority is cited for this bold proposition. Makarenko's Answering Brief (supra) further curiously cites to a post-default judgment declaration of her counsel (in opposition to the motion to vacate), for details on the efforts to serve within the State. This belated declaration and argument overlook the fact the defective statutory affidavit is not "curable" post-judgment, and that the judgment was void as a matter of law.

Makarenko further claims for the first time on appeal (Answering Brief, at p. 31), that her Complaint, when coupled with her counsel's statutory affidavit, are together sufficient to satisfy RCW 4.28.185(4). However, her Complaint was not verified and does not qualify as proof that CISDF had a physical presence in the State of Washington for purposes of

service of process. (CP 5) The Complaint makes no reference whatsoever to this issue. If anything, it creates more issues for Makarenko, not less, since Paragraph 6 of her Complaint (at CP 6) alleges that CISDF has substantial contacts, and possibly even a physical presence, in the State of Washington:

> Defendant solicits and accepts donations from all the United States, including Washington State.

Makarenko's Answering Brief (at pp. 29-30) incorrectly claims there is no issue of compliance with RCW 4.28.185(4), because CISDF allegedly has failed to show injury relating to the defective affidavit. First, Makarenko provides no case citation or authority which injects the issue of a defendant's prejudice or injury into an evaluation of substantial compliance or subject matter jurisdiction under RCW 4.28.185(4). Second, it is evident from the cited cases that the pertinent question is not whether a defendant has suffered injury, but whether sufficient facts have been presented for the trial court to justify resort to the long arm statute of this State, and in the process establish the court's jurisdiction over a dispute against a non-resident.

C. THE JURISIDICTIONAL DEFECTS IN MAKARENKO'S CIVIL RULE 55(a) NOTICE.

1. Makarenko's Clear Violations of CR 55(a).

Makarenko's non-compliance with the notice requirements of Civil Rule 55(a) is also plain, notwithstanding her counsel's arguments on appeal. The deficient notice further deprived the trial court of jurisdiction

and rendered her judgment void as a matter of law. Rosander v. Nightrunners Transport, Ltd., 147 Wn.App. 392, 196 P.3d 711, 714 (Div. Two 2008). First, Makarenko's counsel mailed a copy of her final, signed motion and affidavit to CISDF's registered agent on November 2, 2011, but she failed to provide, at the same time, notice of the hearing on the motion – as required by Civil Rule 55(a). (CP 218) This cannot be disputed by Makarenko. Second, assuming arguendo she had mailed all requisite pleadings under Civil Rule 55(a), the default judgment (CP 42) was entered only 5 days after mailing of her signed motion and affidavit, not the minimum of 8 days required for service by mail. See Civil Rule 6 (e), 55(a)(3); CP 42. This also cannot be disputed by Makarenko.

2. Makarenko's October 24, 2011 Letter Did Not Satisfy the Notice Requirements of Civil Rule 55(a).

To overcome the absence of a proper and timely served Civil Rule 55(a) notice, Makarenko creatively asserts (Answering Brief, at pp. 16-18) that her counsel's October 24, 2011 letter to CISDF (warning of a potential default judgment if its answer was not filed), along with an unsigned draft motion and declaration for default, satisfied CR 55(a). (CP 184, et seq.) Makarenko fails to cite to a single authority in support of her position that a party's counsel can re-mold the jurisdictional notice requirements of CR 55(a) and disregard its clear and unequivocal terms. This argument is no more supportable than Makarenko's argument under RCW 4.28.185(4),

where she proposes that counsel for a party be given wide latitude in determining what form the jurisdictional affidavit under our long arm statute should take.

The October 24, 2011 letter by Makarenko's counsel (CP 184), (i) without a note for hearing, (ii) without a final, signed motion, (iii) without a final signed declaration, and (iv) without any other indication of a definitive date and time for the hearing on the motion for default judgment, falls far short of satisfying the minimum notice requirements of CR 55(a), let alone substantial compliance. Nor did Makarenko's unsigned, draft pleadings comply with Civil Rule 11(a), which requires that "every pleading . . . of a party represented by an attorney shall be dated and signed. . . ."

Makarenko's counsel could have readily corrected these deficiencies by (i) preparing a formal note for hearing, and (ii) timely mailing to CISDF of service copies of a properly signed note, motion, and affidavit. For whatever reason, Makarenko or her counsel chose to accelerate the default judgment process, and to deprive CISDF of the required notice and time to respond. As a result, she ended up depriving this Court of jurisdiction, which rendered the default judgment void.

3. Makarenko's Incorrectly Contends That No Appearance (Let Alone An Answer) Was Made By CISDF.

To overcome the patently deficient CR 55(a) notice, Makarenko alternatively contends that no appearance was made by CISDF, and as a

result no notice requirements were triggered. (Answering Brief at pp. 14-16) This argument is based on (i) hyper-technical arguments about the form of CISDF's answer, and (ii) Makarenko's contention that its answer was in effect a nullity because it was never filed and was signed by a pro se defendant. None of these arguments can withstand close scrutiny.

The Form Objections. With respect to the issue of pleading form, Civil Rule 8(e)(1) unequivocally states that: "No technical forms of pleadings . . . are required." Civil Rule 8(b) consistently states:

> "Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all paragraphs except such designated averments or paragraphs as he expressly admits; . . . " [Emphasis added]

Here, CISDF's 8-page, single-spaced, Answer (CP 176-183) provides (i) a general denial of the allegations in the complaint (as expressly admitted by Makarenko in her counsel's original declaration in support of the default judgment, at CP 20, Par. 5), (ii) the specific denial of certain allegations (see CP 177, 179, 180, 182, 183), and (iii) a counterclaim for relief against Makarenko (CP 183). It clearly met and exceeded the well-established, liberal requirements for a pleading under our Civil Rules.

Makarenko time and again disparages CISDF's Answer as a mere letter which has none of the indicia of an answer. (See CP 20; Answering Brief at pp. 12-15) In truth, other than the "Dear Sir" and "Sincerely" at the

beginning and end of CISDF's letter, it has all of the indicia of an answer. The first sentence begins "Please accept our allegations for each point of your complaint" (emphasis added).(CP 65, 72) Each paragraph and cause of action of the complaint is thereafter restated in full. (CP 65-71) There is a numbered response by CISDF with respect to each paragraph and cause of action. (Supra) There is also a counterclaim asserted, albeit one for "moral damages". (CP 72) The pleading concludes with a "WHEREFORE" clause and demand, which seeks not only damages on its counterclaim, but also "any other relief deemed just, equitable or appropriate by this court." (CP 72)

Neither at the trial court level, nor in her Answering Brief, has Makarenko identified any genuine, good faith challenge to the technical form of CISDF's Answer. Nor can she logically explain why its Answer and Counterclaim were not enough to constitute at least an appearance for purposes of the notice requirements of CR 55(a). Makarenko's original opposing memorandum (CP 267-268) does weakly object to the fact that 16 paragraphs of CISDF's Answer deny facts based on lack of knowledge or information. Her counsel argues that CISDF in some manner had had ample time to conduct discovery as to Makarenko's allegations. (Supra) This contention is patently specious, in particular with respect to the original Answer timely served (by all parties' accounts) well within 60 days of service of process. It is equally specious with respect to the proposed

amended answer submitted by CISDF's counsel, considering the relatively short time frames involved and the unavailability of discovery after entry of the default judgment. Not surprisingly, Makarenko fails to cite to any authority for her argument.

Makarenko's Answering Brief (at p. 17) also defers to her original memorandum at the trial court level in opposition to the motion to vacate, for clarification of certain "additional" bases for objecting to the form of CISDF's Answer. But, the memorandum (at CP 267-268) makes a vague assertion of non-compliance with CR 8(e), without further explanation.

The Filing Objections. Makarenko mistakenly contends in her trial court pleadings and Answering Brief that an appearance or answer must be filed for purposes of triggering the notice requirements of Civil Rule 55(a). Her original motion for default (CP 18), supporting declaration (CP 20), and Answering Brief (at pp. 21-24) boldly treat CISDF's lack of such a filing as constituting, among other things: a failure to plead; non-compliance with a judicial summons; inexcusable neglect; and, unclean hands. Makarenko's motion for default even identifies the lack of a "filing" as the sole basis for seeking a default judgment. (CP 18)

Makarenko cites to no authority in support of her CR 5 argument on the mandatory filing of pleadings, and the impact of not filing, other than a reference to the general filing rule set forth in Civil Rule 5(d). (Answering

Brief, at p.12) Civil Rule 5(d) does not in any way automatically "nullify" a served pleading, nor does it authorize an opposing party's utter disregard of a served pleading, due to the lack of a filing. To the contrary, Civil Rule 5(d)(2) establishes a mechanism (i.e., a motion to strike) and potential sanctions for a failure to file after proper notice. No such relief was sought by Makarenko.

Moreover, the authorities and case law on general appearances for purposes of the Civil Rule 55(a) notice are uniformly contrary to Makarenko's assertions, and are cited at length in CISDF's opening brief on appeal (at pp. 21-24). The Supreme Court, in Morin v. Burris, 160 Wn.2d 745, 161 P.3d 956, 961-962 (2007), re-affirmed the concept of an informal, out-of-court, appearance, citing favorably to State ex rel. Trickel v. Superior Court, 52 Wn. 13, 100 Pac. 155 (1909), where a defendant had not filed a formal notice of appearance in court, but had served interrogatories upon the plaintiff. In Old Republic National Title v. Law Office of Robert E. Brandt, PLLC, 142 Wn.App. 71, 174 P.3d 133, 135 (2008), Division Two held that "substantial compliance with the appearance requirement may be satisfied informally," and that even a "telephone call can constitute a notice of appearance." In Sacotte Construction, Inc. v. National Fire & Marine Ins. Co., 143 Wn.App. 410, 177 P.3d 1147, 1150, 1151 (Div. One 2008), the Court of Appeals held that one telephone call is sufficient to constitute an

appearance, when made after service of a complaint and with the intent to avoid a default without notice. Seek Systems, Inc. v. Lincoln Moving, 63 Wn.App. 266, 270, 818 P.2d 618 (Div. Two 1991), and 4 Tegland's Washington Practice Series (5th Ed. 2006), at CR 55, p. 329), are in accord.

The Intent to Defend Objection. Makarenko contends that CISDF's Answer did not show a sufficient intent to defend, thus depriving it of status as an appearance, or the answer and counterclaim self-evident on its face. (Answering Brief at pp. 12-15) Makarenko fails to cite to a single authority to support her argument that: (i) a comprehensive, line item response to a complaint, (ii) after commencement of a lawsuit and service of the complaint, (iii) within the time frame for filing an answer, and (iv) containing a counterclaim and prayer for relief from the Court, did not rise – at the minimum – to the level of an appearance and evidence an intent to defend. Common sense dictates otherwise. (See CISDF pro se Answer and Counterclaim at CP 64-72)

Pro Se Status and Effect. Makarenko's Answering Brief (at p. 14) grudgingly concedes that a valid appearance can be accomplished informally, citing to Morin v. Burris, 160 Wn.2d 745, 749, 161 P.3d 956 (2007). Then, she reverts back to the untenable argument that CISDF's otherwise timely service of its comprehensive answer and counterclaim was of no import (i.e., for purposes of requiring notice under Civil Rule 55(a)) because of its pro se

nature. (Supra) In making this argument, Makarenko fails to reconcile the numerous authorities cited by CISDF dealing with this very issue, which uniformly required that reasonable notice be provided to a pro se party of an invalid pleading before striking it. See Biomed Comm. v. Department of Health, Board of Pharmacy, 146 Wn.App. 929, 932-933, 193 P.3d 1093 (Div. One 2008); Finn Hill Masonry, Inc. v. Department of Labor and Industries, 128 Wn.App. 543, 545, 116 P.3d 1033, 1034 (Div. Two 2005).

Makarenko confusingly recites (Answering Brief, at p. 13) to Cottringer v. State, 162 Wn.App. 782 (Div. One 2011), 787, 257 P.3d 667 (2011),and to Lloyd Enterprises, Inc. v. Longview Plumbing & Heating Co., Inc., 91 Wn.App. 697, 699, 958 P.2d 1035 (Div. One 1998), for the proposition that a corporation must be represented by counsel. Makarenko fails to mention the critical facts that: (i) Division One dismissed each case only after providing the pro se party with reasonable notice (30 days in one case, 20 days in the other) within which to retain counsel, and (ii) neither case addressed what was an acceptable appearance or answer for purposes of triggering the notice requirements of CR 55(a)

Required CR 55(a) Hearing. Makarenko makes the additional contention (Answering Brief at p. 17) that no court rule requires her to schedule a hearing on her motion for default, and then boldly declares she "did not seek a hearing on her Motion for Default." (Supra) CR 55(a)(3)

could not be more clear, and to the contrary, stating that:

> "Any party who has appeared . . . shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion." [Emphasis added]

CR 55(a)(2) similarly states that a party may respond "at any time before the hearing on the motion." (Emphasis added) Inherent in these provisions is the requirement of notice of the date and time of the hearing on the motion (or equivalent return date). It is illogical to argue that under CR 55(a) the moving party only has to provide copies of her motion for default, in a veritable vacuum, without disclosure of the return date or hearing date. It is even less logical to argue, as does Makarenko, that she can elect whether or not to have a hearing on her motion for default, after an appearance by a party (thus avoiding the notice requirement altogether). In either situation, the failure to disclose a return date for the CR 55(a) motion left CISDF in the dark on a critical time frame for responding, undermines a defendant's opportunity to appear and object at a hearing, and invites mischievousness on the part of a plaintiff seeking the accelerated resolution of a matter.

D. UNCHALLENGED DEFENSES OF WAIVER, JUDICIAL ESTOPPEL, AND VIOLATION OF DUE PROCESS.

Makarenko fails to address, in her Answering Brief, CISDF's denial of due process argument relating to the lack of notice and opportunity to correct its pro se status. She has further failed to address CISDF's arguments that she

has waived any objection to, or should be judicially estopped from disputing, its pro se status for purposes of the CR 60(b) motion to vacate.

Prior to entry of her default judgment, Makarenko's counsel sent an October 24, 2011 letter to CISDF's registered agent, specifically requesting that it "file an answer or appear." (CP 184) Nowhere in that letter did Makarenko's counsel challenge the adequacy of the previously served pro se status or answer, demand that CISDF retain counsel, or threaten to move to strike the answer on this ground. Makarenko's motion for default similarly made no such objections or demands with respect to CISDF's pro se status. (CP 15, 19)

CISDF's principals reasonably believed that the service of its comprehensive answer and counterclaim satisfied the requirements set forth in the Summons for responding to the Complaint, as well as its obligations under the Civil Rules. (CP 53-54 at Pars. 20-21) It was never placed on notice of any alleged inadequacy in the form of its pleading, until Makarenko responded to its motion to vacate in early January 2012, i.e., almost 2 months after the entry of the default judgment. (Supra)

On due process grounds, as well as under the doctrines of waiver and judicial estoppel (none addressed by Makarenko), the challenges to CISDF's pro se status should have been rejected for purposes of evaluating the CR 60(b) motion to vacate. The trial court abused its discretion in not doing so.

These arguments, and case citations, are forth in more detail in CISDF's opening brief on appeal (at pp. 29-33).

E. CISDF HAS SATISFIED THE CRITERIA FOR VACATION OF THE DEFAULT AND DEFAULT JUDGMENT UNDER CR 60(b)(1), (4), (5), and (11).

Makarenko's Answering Brief cites (at pp. 19-24) to White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968), as the definitive authority on motions to vacate. However, in White v. Holm, the Supreme Court reversed the trial court judgment and remanded the case for a trial on the merits. (Supra at 73 Wn.2d 349) White v. Holm held (at 73 Wn.2d 351-352) that unless a motion is "manifestly insufficient or groundless" the discretionary authority to vacate should be exercised "liberally". It held that where the trial court has denied a motion to vacate and a trial on the merits, "an abuse of discretion may be more readily found than in those instances where the default judgment is set aside and a trial on the merits ensues." It further held that evidence of "at least a prima facie defense" is sufficient to justify vacation, and scant time will be spent evaluating the motion to vacate when a "strong or virtually conclusive defense" has been demonstrated. Supra at 73 Wn.2d 352.

CISDF submits that it has met the criteria set forth in White v. Holm, and propounded in Makarenko's Answering Brief, for vacation under CR 60(b). First, substantial evidence of at least a strong, if not conclusive, defense to Makarenko's claim has been provided. CISDF's two principal

officers have explained, in their declarations in support of their motion to vacate (CP 46, 73), that her claim runs completely contrary to how the company has operated its business for the 17 years of its existence, that no contrary arrangement or agreement was reached as alleged by Makarenko, that CISDF fully performed in conformity with the agreement it did have with Makarenko (separate and distinct from any with the St. Nicholas charity), that the monetary donations received by it are never tied to a specific shipment or container of aid, that Makarenko's donation of $46,500 covered the expenses of shipping three containers ($1.3 million worth) of donated clothing to the Ukraine, and that this clothing was shipped timely to and received by the charity. CISDF further provided three Bills of Lading (CP 56-59) and three Receipts from the charity (CP 60-63) conclusively evidencing CISDF's timely and full performance, as well as the representation of St. Nikola therein that the donated clothing would be distributed "at no charge to the needy at [St. Nikolas]". (Supra)

Second, CISDF's actions did not rise to the level of inexcusable neglect, when it timely complied with the Summons served on it by serving its answer with 60 days of service of process; when it was never notified of any objection to its pro se status; when Makarenko's counsel's October 24, 2011 letter and draft pleadings requested that CISDF file its answer or an appearance, but never challenged its pro se status; and, when its principals

reasonably believed from these facts that it had complied with the requirements for answering and avoiding a default.

Third, there is no dispute as to counsel for CISDF's diligent actions after the entry of the default judgment. (Answering Brief at pp. 25-26) Contact was made with Makarenko's counsel within two weeks of the entry of the default judgment, and immediately upon being retained. (CP 81)

Fourth, substantial injury has been demonstrated to CISDF's reputation and goodwill, and the impact on its charitable activities, with the entry of a default judgment for alleged fraud. (CP 48-49) Makarenko, in contrast, incorrectly cites to the burden and emotional distress of pursuing her claim as her principal "hardship" if the default judgment is vacated, although she would have had the same burdens with or without entry of the judgment.

Makarenko misguidedly cites to Prest v. American Bankers Life Assur. Co., 79 Wn.App. 93, 900 P.2d 595 (Div. Two 1995), in support of her argument on appeal. In that case, Division Two reversed the trial court's vacation of a default judgment against an insurance company, on the ground the company's defense was not sustainable due to its clear inability to demonstrate compliance with certain related statutory insurance provisions in RCW 48.18.080(1) and 48.18.260(1). No similar, dispositive, issue of law exists against CISDF's defenses.

Makarenko's counsel could have avoided the inconvenience and expense of the present motion practice and appeal, if he had not misconstrued, and mis-characterized to the trial court, CISDF's unequivocal answer as a mere "letter" with no legal effect, and if he had provided timely service under CR 55(a). These failures, coupled with the misplaced focus in the motion for default on CISDF's failure "to file" (versus serve) its answer, created a situation ripe for error and unnecessary confusion. Vacation should have been allowed by the trial court under CR 60(b)(4), (5), and (11) as a result, and it was error and an abuse of discretion for the trial court not to have done so.

F. THE MOTION TO AMEND.

Makarenko provides no credible objection to CISDF's CR 15(a) motion to amend its original answer. She only claims that the original Answer should not be viewed as a proper pleading because of form issues and CISDF's pro se status, and that as a result there was nothing to amend. Irrespective of the original form or status of CISDF's answer, for purposes of its CR 15(a) motion it is now represented by counsel, who has provided a reasonable restatement of CISDF's original response and defenses to the Complaint. If the trial court's order is reversed on appeal, and this matter remanded for a trial on the merits, this Court should concurrently grant

CISDF's motion to amend or remand this case to the trial court for further proceedings consistent with this Court's opinion.

G. HEARSAY EVIDENCE.

Makarenko's opposition to CISDF's motion to vacate relied at the trial court level, and continues on appeal to rely, on plainly inadmissible hearsay. This proof should have been stricken by the trial court, and should now be rejected on appeal.

Makarenko's original, opposing declaration (CP 142) is replete with hearsay and double hearsay by her brother and a representative of the St. Nicholas charity in the Ukraine. Neither one has been established to be an agent or representatives of CISDF. With this hearsay, she seeks to establish an agreement (which CISDF has denied), to establish a partnership between CISDF and the St. Nicholas charity (which CISDF has denied), and to offer admissions against CISDF through statements allegedly made by her brother, her Ukrainian counsel and a representative of the charity, none of whom represents CISDF. For the reasons set forth in its opening brief on appeal, statements by alleged, but disputed, agents as to their authority (let alone Makarenko's hearsay recitation of their statements) cannot establish agency and must be stricken. State of Washington v. Chambers, 134 Wn.App. 853, 142 P.2d 668, 670 (Div. Two 2006).

If, as Makarenko states on appeal (Answering Brief, at p. 35), hearsay is offered by her only to show that CISDF had knowledge of this lawsuit, then none of the statements by her brother, her Ukrainian lawyer, or the St. Nicholas representative, falls within any exceptions to the hearsay rule. They should have been stricken from the record by the trial court, and should not be considered on appeal.

Makarenko has also improperly sought to introduce (through attorney Caitlin Wong, Esq.) hearsay statements by a New York attorney who did not represent CISDF, to show what "knowledge" CISDF allegedly had or should have had of Washington procedure. (CP 147) There is no foundation for such an offer, since the attorney had no prior relationship with CISDF. In any event, that New York attorney has submitted his own declaration in this matter, and has unequivocally stated that he was not counsel for CISDF, and denies the allegations by Makarenko's counsel as to what he said. (CP 77-79)

H. REQUESTS FOR ATTORNEYS' FEES ON APPEAL.

CISDF seeks an award of fees and costs under RAP 18.1 and RCW 4.28.185(5) of the long arm jurisdiction statute. This request on appeal is limited to the fees and costs of pursuing its motion to vacate the existing default judgment, at the trial court level and on appeal. If the relief requested on appeal is granted, CISDF will be the prevailing party with respect to the validity of the default judgment. Upon the conclusion of this appeal, the

issues relating to the improper default judgment and motion to vacate will be closed and a final order on its attorneys' fees and costs can be entered pursuant to CR 54(b). Fees and costs would be appropriate in these circumstances.

CISDF's fees relating to the CR 60(b) motion to vacate, and the prosecution of its jurisdictional defenses, are "added costs" of having to litigate in Washington State, versus its home state of New Jersey. These fees would not have been incurred if it had been served, and the present lawsuit brought, in New Jersey. They are an "added litigative burden" directly resulting from Makarenko's use of the long arm statute to extend Washington jurisdiction over CISDF, and should be recoverable under RCW 4.28.185(5). As such, CISDF's application satisfies the criteria for fees set forth in Payne v. Saberhagen Holdings, Inc., 147 Wn.App. 17, 190 P.3d 102 (2008) and Scott Fetzer Co. v. Weeks, 114 Wn.2d 109, 120, 786 P.2d 265 (1990).

Makarenko's answering brief (at pp. 39-40) does not address the unique circumstances of CISDF's appeal, which if successful would justify an award of fees. Instead, she counters with a vague and unsupported counter demand for her own fees under RAP 18.1 and CR 60(b), alleging that: (i) CISDF did not respond properly to her original complaint, (ii) she has had to defend against a frivolous appeal, (iii) CISDF has failed to include new arguments or rebut prior arguments, and (iv) CISDF has failed to provide

authorities rebutting two cases relating to an award of fees under RCW 4.28.185(5). No authority is cited by Makarenko for an award of fees because of the alleged failure to answer initially. CISDF's arguments on appeal are well grounded in fact, warranted by existing law or an extension of existing law, and otherwise comply with the requirements of Civil Rule 11(b). CISDF's extensive briefing in its opening brief and reply brief appeal, and its fully developed record, demonstrate the requisite abuse of discretion for reversal of the trial court's orders.

## I. CONCLUSION AND RELIEF REQUESTED.

CISDF respectfully requests that the March 22, 2012 Order of the trial court be reversed, and the default and default judgment be vacated pursuant to CR 60(b)(1), (4), (5), and (11); that it be awarded its reasonable fees and costs under RAP 18.1 and RCW 4.28.185(5); that its CR 15(a) motion for leave to amend be granted; and, that this matter be remanded to the trial court for further proceedings consistent with this Court's opinion.

RESPECTFULLY SUBMITTED on this 18th day of September 2012.

STERNBERG THOMSON OKRENT
& SCHER, PLLC

By _____
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CERTIFICATE OF SERVICE

The undersigned counsel of record for appellant certifies that he caused the original of this Reply Brief of Appellant to be filed with the Clerk of the Court, and a true and correct copy to be delivered by U.S. Mail, postage prepaid, to counsel for respondent Nataliya Makarenko, i.e., Ronald T. Adams, Esq., Black Helterline LLP, 805 S.W. Broadway, Suite 1900, Portland, Oregon 97205, on or before September 19, 2012.

Terry E. Thomson, WSBA # 5378